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THE LARYNGEAL MASK COMPANY LTD.  
11 and LMA NORTH AMERICA, INC.

12 **IN THE UNITED STATES DISTRICT COURT**  
13 **FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

14 THE LARYNGEAL MASK COMPANY  
15 LTD. and LMA NORTH AMERICA, INC.,

16 Plaintiffs,

17 v.

18 AMBU A/S, AMBU INC., and AMBU LTD.,

19 Defendants.

21 AMBU A/S, AMBU INC., and AMBU LTD.,

22 Counterclaimants,

23 v.

24 THE LARYNGEAL MASK COMPANY  
25 LTD. and LMA NORTH AMERICA, INC.,

26 Counter-Defendants.  
27  
28

Civil Action No. 07 CV 1988 DMS (NLS)

**PLAINTIFFS' MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
SUPPORT OF THEIR DAUBERT  
MOTION TO EXCLUDE THE  
EXPERT TESTIMONY OF RYAN  
SULLIVAN, Ph.D.**

**Date: September 25, 2009  
Time: 1:30 p.m.  
Courtroom 10, 2<sup>nd</sup> Floor**

**Honorable Dana M. Sabraw**

**CONFIDENTIAL PORTIONS  
FILED UNDER SEAL**

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1 Pursuant to Federal Rule of Evidence 702, Plaintiffs/Counter-Defendants The Laryngeal  
2 Mask Company Ltd. and LMA North America, Inc. (collectively “LMA”) respectfully move to  
3 exclude the expert testimony of Ryan Sullivan, Ph.D., whose testimony  
4 Defendants/Counterclaimants Ambu A/S, Ambu Inc., and Ambu Ltd. (collectively “Ambu”) seek  
5 to offer on the issue of damages. LMA’s motion is supported by this memorandum of points and  
6 authorities and by the Declaration of Joshua J. Stowell (“Stowell Decl.”) and accompanying  
7 exhibits.

8 **I. PRELIMINARY STATEMENT**

9 Under Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,  
10 509 U.S. 579, 597 (1993), expert testimony must be “properly grounded, well-reasoned and not  
11 speculative.” FED. R. EVID. 702 (2008), Advisory Committee Note (2000). Judicial analysis of the  
12 relevance and reliability of expert testimony is “vital to ensure accurate and unbiased decision-  
13 making by the trier of fact.” *Elsayed Mukhtar v. Cal. State Univ. Hayward*, 299 F.3d 1053, 1063  
14 (9th Cir. 2002). “[N]othing in either *Daubert* or the Federal Rules of Evidence requires a district  
15 court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the  
16 expert.” *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997).

17 The expert testimony Ambu seeks to offer in support of its damages claims falls far short  
18 of the above standards. Ambu brings counterclaims under the Lanham Act and state law based on  
19 alleged false advertising by LMA beginning in 2005. In addition to injunctive relief, Ambu seeks  
20 monetary relief in the form of unjust enrichment (LMA’s profits), Ambu’s lost profits, and future  
21 corrective advertising costs. To support its claims for monetary relief, Ambu proffers the  
22 testimony of Ryan Sullivan, Ph.D., an economist and professional expert witness. 

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1 Dr. Sullivan's opinions regarding the existence and the amount of damages in this case  
2 should be excluded under Rule 702 and *Daubert* for two reasons. *First* Dr. Sullivan is not  
3 qualified to opine on whether LMA gained or Ambu lost sales as a result of LMA's advertising,  
4 because he is merely an economist and has no special expertise or knowledge regarding the  
5 laryngeal mask market. *Second*, Dr. Sullivan's conclusions regarding the amount of damages  
6 Ambu incurred are based on insufficient and unreliable data, arbitrary assumptions, and faulty  
7 economic analysis.

8 [REDACTED] According to Dr. Sullivan, even though Ambu's sales did not decline after the  
9 dissemination of the alleged false advertising, Ambu would have achieved an even greater sales  
10 share than its LMA – to the tune of 35.4% – but for the alleged false advertising. Specifically,  
11 based on 14 months of wildly irregular and arbitrarily selected monthly sales totals from the start  
12 of Ambu's business, Dr. Sullivan opines that but for the alleged false advertising, Ambu would  
13 have achieved a future monthly growth rate of 1%. He then goes on to assert, without any  
14 evidentiary foundation or support, that it is "reasonable" to assume that Ambu would have  
15 experienced that 1% monthly growth rate for at least three years.

15 Although Dr. Sullivan dresses up his damages calculations with economic equations and  
16 graphs, in fact, those calculations are nothing more than mere *ipse dixit* testimony.

17 [REDACTED] Ambu's first 14 months of business simply make up too small and insignificant a sample  
18 upon which to predict a future growth rate. What is more, Dr. Sullivan has no basis for predicting  
19 that Ambu's growth rate would continue unabated for three years. Indeed, Ambu's own market  
20 share projections made before the dissemination of the alleged false advertising forecast a  
21 significantly lower market share than the one predicted by Dr. Sullivan's paid-for and self-serving  
22 "expert" opinion. In short, Dr. Sullivan's damages calculations are too unreliable and speculative

23 [REDACTED] "expert" testimony. "[T]here is simply too great an analytical gap between the data and  
24 the opinion proffered." *Joiner*, 522 U.S. at 146.

## 25 II. FACTUAL BACKGROUND

26 The relevant facts of this case are set forth in LMA's two memoranda of law in support of  
27 its motions for summary judgment.  
28

### III. THE PROFFERED TESTIMONY OF DR. SULLIVAN

Dr. Sullivan has a Ph.D. in economics, is president of an economics analysis firm, and is proffered by Ambu as "an expert in economics, finance, and statistics [who] applies his skills to strategic decisions and expert witness analyses." Stowell Decl., Ex. 1 at Appendix 1. Dr. Sullivan states that he was "asked to calculate the financial damages incurred by Ambu, if any, as a result of alleged false advertising, unfair competition and other related claims." *Id.* at 2. In a 30-page report, Dr. Sullivan devotes the first 25 pages to a description of the parties, the marketplace, the alleged conduct, and the purported effect of the alleged conduct. Based on his review of the evidence produced in this case, including documents and deposition excerpts, Dr. Sullivan opines that the "[e]vidence demonstrates that sales of Ambu products were affected by the extensive use of the LMA Brochure." *Id.* at 21; see also *id.* at 20 ("LMA representatives used the LMA Brochure extensively, such that it had a significant effect on sales."); *id.* ("LMA's use of the Ferson Study and LMA Brochure, along with LMA's other communications of false and misleading statements, enabled LMA to make sales of laryngeal masks that it otherwise would not have made. That is, but for LMA's use of the Ferson Study, LMA Brochure, and other communication of false and misleading statements, LMA's sales of laryngeal masks would have been less.").

Dr. Sullivan devotes only five pages of his report to the calculation of the amount of Ambu's purported damages. Dr. Sullivan attempts to quantify three categories of damages: (1) "unjust enrichment," which Dr. Sullivan defines as the amount of profits that LMA gained as a result of the alleged false advertising; (2) the amount of profits Ambu lost as a result of LMA's alleged false advertising; and (3) the amount of advertising expenses necessary to correct the effects of the alleged false advertising. *Id.* at 26-30.

With respect to the first category of damages, Dr. Sullivan attempts to determine the profits LMA allegedly gained as a result of the alleged false advertising by calculating what he labels "unjust sales," i.e., the difference between the sales of laryngeal masks that LMA actually made between August 2005 and April 2009, and the purportedly lower amount of sales that LMA allegedly "would have made but for the alleged conduct." *Id.* at 26. Dr. Sullivan calculates "unjust

1 sales" separately for the LMA Unique, which competes with the Ambu AuraOnce, and for the  
2 LMA Classic, which competes with the Ambu Aura40. *Id.* at 27. Dr. Sullivan calculates the so-  
3 called "unjust sales" by assuming that LMA and Ambu are the only two sellers in the marketplace  
4 for laryngeal masks, and then "determining Ambu's relative sales share that would have been  
5 realized in the absence of the alleged conduct." *Id.* at 26. Specifically, Dr. Sullivan "linearly  
6 increase[s] Ambu's relative sales share over a period of 36 months, starting from product  
7 inception [which Dr. Sullivan assumes is April 2004], to a value of 35.8%." *Id.* According to Dr.  
8 Sullivan "[a] relative sales share of 35.8% comports with Ambu's sales performance prior to the  
9 alleged conduct and recognizes LMA's established market position." *Id.* After calculating a profit  
10 per unit for the LMA Unique and LMA Classic and applying it to the amount of unjust sales LMA  
11 allegedly gained, Dr. Sullivan asserts that LMA gained \$4,731,703 in profits for the LMA Unique  
12 and \$1,908,123 in profits for the LMA Classic as a result of the alleged false advertising during  
13 the period August 2005 to April 2009 (the time period he assumes to be the damages period for  
14 this case). *Id.* at 27.

15 Dr. Sullivan attempts to determine the second category of damages, *i.e.*, the profits Ambu  
16 allegedly lost as a result of LMA's conduct, in a similar manner as the first category. Asserting  
17 that "[b]ut for the alleged conduct engaged in by LMA, LMA's unjust sales would have been  
18 made by Ambu," Dr. Sullivan assumes that the amount of sales Ambu lost as a result of the  
19 alleged false advertising is the same as the amount LMA allegedly gained. *Id.* at 28. After  
20 calculating a profit per unit for the Ambu AuraOnce and the Ambu Aura40 and applying that rate  
21 to the amount of sales LMA allegedly gained, Dr. Sullivan claims that Ambu lost profits of  
22 \$5,469,825 for the Ambu AuraOnce and as \$1,801,778 for the Ambu Aura40 as a result of the  
23 alleged advertising between August 2005 to April 2009. *Id.*

24 With respect to the third category of relief, Dr. Sullivan claims that "[t]he expenses  
25 incurred by LMA to advertise, market, and promote the Ferson Study and the LMA Brochure, and  
26 the statements contained therein, provide a reasonable proxy for the expenditure that would be  
27 required by Ambu to correct the false and misleading statements." *Id.* Specifically, Dr. Sullivan  
28 asserts that LMA spent \$561,471 on advertising expenses from June 2005 through December 2008

1 and that amount "is a lower bound on the expenditure that would be required by Ambo to correct  
2 the false and misleading statements." *Id.* at 29. Dr. Sullivan further asserts that LMA has "average  
3 annual marketing expenses of approximately \$4.9 million" and that that amount is "a reasonable  
4 estimate for the expenditure that would be required by Ambo to correct the false and misleading  
5 statements."

#### 6 IV. ARGUMENT

##### 7 A. Rule 702 and *Daubert* Require the Exclusion of Unreliable Economic Expert 8 Testimony

9 Federal Rule of Evidence 702 permits witnesses qualified as experts by "knowledge, skill,  
10 experience, training, or education" to testify "in the form of an opinion or otherwise" about  
11 "scientific, technical, or other specialized knowledge" if the knowledge will "assist the trier of fact  
12 to understand the evidence or to determine a fact in issue." FED. R. EVID. 702. The expert's  
13 testimony must be "based on sufficient facts or data" and "the product of reliable principles and  
14 methods." *Id.* Furthermore, the expert must apply these "principles and methods reliably to the  
15 facts of the case." *Id.* Thus, Rule 702 requires the trial judge to find that expert testimony is  
16 "properly grounded, well-reasoned and not speculative before it can be admitted." *Id.*, Advisory  
17 Committee Note (2000). The proponent of the proffered expert testimony has the burden of  
18 establishing the admissibility of the testimony by a preponderance of the evidence. *Id.*

19 Rule 702 was amended in response to and implements the principles of *Daubert*, which  
20 established a "gatekeeping role for the judge," whereby the court must evaluate proffered expert  
21 evidence in the first instance rather than leaving the task for the jury to sort through. 509 U.S. at  
22 597; *see also Joiner*, 522 U.S. (reaffirming "the 'gatekeeper' role of the trial judge in screening  
23 such evidence"). To that end, the trial court must ensure that expert testimony "is not only  
24 relevant, but reliable." *Daubert*, 509 U.S. at 589. A court should exclude expert testimony if "there  
25 is simply too great an analytical gap between the data and the opinion proffered." *Joiner*, 522 U.S.  
26 at 146.

27 The courts' gatekeeper function applies not only to cases involving "scientific" knowledge  
28 but also in cases involving "technical" and "other specialized" knowledge. *Kumho Tire v.*



1 *Carmichael*, 526 U.S. 137, 141 (1999). With respect to economic expert testimony, courts must  
2 assess whether the expert relied on data reasonably used by economic experts and had good  
3 grounds to rely on such data in drawing conclusions. Courts have not hesitated to exclude the  
4 opinions of economic experts that are based on faulty assumptions, insufficient data, or  
5 guesswork. *See, e.g., Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1056-57 (8th Cir.  
6 2000) (excluding expert economic testimony that did not consider all relevant facts in relevant  
7 market when performing market share analysis; “[b]ecause of the deficiencies in the foundation of  
8 the opinion, the expert’s resulting conclusions were “mere speculation”) (citation omitted); *Target*  
9 *Market Publ’g v. ADVO, Inc.*, 136 F.3d 1139, 1143 (7th Cir. 1998) (excluding economic expert’s  
10 projections of lost profits that was unsupported and based on mere speculation); *Williams v. Rene*,  
11 72 F.3d 1096, 1101-03 (3d Cir. 1995) (reversing admission of expert damages testimony where,  
12 despite significant detail, underlying assumption was “unsupported and speculative”); *Joy v. Bell*  
13 *Helicopter Textron, Inc.*, 999 F.2d 549, 569 (D.C. Cir. 1993) (finding that it was error to admit  
14 expert damages testimony which was premised upon speculative earning estimates where “the  
15 decision to receive expert testimony was simply tossed off to the jury under a ‘let it all in’  
16 philosophy” because “we must resist the temptation to answer objections to receipt of expert  
17 testimony with the shorthand remark that the jury will give it the weight it deserves”), *modified on*  
18 *other grounds*, 40 F.3d 475 (D.C. Cir. 1994); *Masterson Mktg., Inc. v. KSL Recreation Corp.*, 495  
19 F. Supp. 2d 1044, 1051 (S.D. Cal. 2007) (excluding expert testimony regarding defendants’ profits  
20 in an infringement case where expert’s opinions “[we]re not supported by any sort of reliable  
21 principle and/or methodology but [we]re rather conclusions based on incomplete suppositions”);  
22 *Martinez v. Rabbit Tanaka Corp.*, No. 04-61504-CIV, 2006 WL 5100536, at \*13 (S.D. Fla. Jan. 6,  
23 2006) (excluding expert opinion on lost profits that “rest[ed] entirely on his recapitulation of the  
24 facts . . . , and a wide variety of [unsupported] assumptions about the marketability of Plaintiffs’  
25 products and the markets available for their distribution”); *see also McGlinchy v. Shell Chem. Co.*,  
26 845 F.2d 802, 807 (9th Cir. 1988) (excluding expert’s future lost profit forecasts that “rest[ed] on  
27 unsupported assumptions and unsound extrapolation”).

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1           **B.       The Proffered Testimony of Dr. Sullivan Should Be Excluded as a Matter of**  
2           **Law Under the Principles of Rule 702 and *Daubert***

3           In his report, Dr. Sullivan explains [REDACTED]

4           [REDACTED]  
5           [REDACTED] Toward that end, he offers opinions regarding the  
6           existence and amount of damages in this case. As explained below, Dr. Sullivan is not qualified to  
7           give an opinion regarding causation, and his opinions regarding the amount of damages allegedly  
8           caused in this case are the product of faulty economic analysis and wild speculation. Accordingly,  
9           Dr Sullivan's opinions must be excluded as a matter of law.

10           **1.       Dr. Sullivan Is Not Qualified to Opine on Whether [REDACTED]**  
11           **[REDACTED] as a Result of the Alleged False Advertising**

12           As explained earlier, based on his purported review of documents produced in the case and  
13           deposition excerpts, Dr. Sullivan concludes that [REDACTED]

14           [REDACTED]  
15           [REDACTED]  
16           [REDACTED]  
17           [REDACTED]  
18           [REDACTED]  
19           [REDACTED]

20           Dr. Sullivan does not have the requisite expertise or experience to render an opinion  
21           regarding whether the alleged false advertising in fact caused Ambu to lose (or LMA to gain) sales  
22           in the laryngeal mask market. In order to testify as an expert, a witness must be qualified by  
23           "knowledge, skill, experience, training, or education." FED. R. EVID. 702 [REDACTED]

24           [REDACTED]  
25           [REDACTED]  
26           [REDACTED]  
27           [REDACTED]  
28           [REDACTED]

1 whether LMA's advertising regarding the Ferson Study caused Ambu to lose (or LMA to gain)  
2 sales. *See Blaine Larsen Processing, Inc. v. Hapco Farms, Inc.*, Civ. No. 97-0212-E-BLW, 1999  
3 WL 34809532, at \*5 (D. Idaho Oct. 18, 1999) (expert was not qualified "to testify about the cause  
4 of market share loss in the Idaho fresh pack potato market" because he did not have "a thorough  
5 knowledge of the Idaho fresh pack potato market").

6 Given Dr. Sullivan's lack of expertise concerning the laryngeal mask market, his proffered  
7 testimony that LMA's advertising caused Ambu to lose (and LMA to gain) sales is nothing more  
8 than a mere summary of – and impermissible spin on – the evidence produced in this case. Such  
9 arm-chair expert testimony is inadmissible as a matter of law under the principles of Rule 702 and  
10 *Daubert*. *See Bracco Diagnostics, Inc. v. Amersham Health, Inc.*, No. 03-6025, 2009 WL  
11 1743699, at \*35 (D.N.J. June 5, 2009) ("[T]o the extent that Mr. Russell's testimony reflected no  
12 more than his summary of, and spin on, internal GEH documents . . . , the Court finds that such  
13 testimony is unhelpful to the Court as the trier of fact and excludes such testimony from the  
14 record. This is because the documents speak for themselves and do not require expert testimony to  
15 discern what they mean."); *Crowley v. Chait*, 322 F. Supp. 2d 530, 553-54 (D.N.J. 2006) (No  
16 expert or "any other witness will be permitted to simply summarize the facts and the depositions  
17 of others. Such testimony comes 'dangerously close to usurping the [factfinder's] function' and  
18 'implicates Rule 403 as a needless presentation of cumulative evidence and a waste of time.'")  
19 (quoting *United States v. Dukagjini*, 326 F.3d 45, 54 (2d Cir. 2003)).

20 **2. Dr. Sullivan's Calculations of [REDACTED]**  
21 **[REDACTED] Are Too Speculative and Unreliable to Be Admitted into**  
22 **Evidence**

23 In addition to speculating that [REDACTED]  
24 [REDACTED]  
25 [REDACTED]  
26 [REDACTED]  
27 [REDACTED]  
28 [REDACTED]

1 those damage amounts is inadmissible as a matter of law because it is the product of unreliable  
2 data, flawed economic analysis, and pure guesswork.

3         Putting aside the numerous errors in the calculation of both LMA's and Ambu's profit  
4 margin,<sup>2</sup> Dr. Sullivan's damages calculations are unreliable because they are based on a wholly  
5 unsupported assumption regarding the amount of sales LMA allegedly gained (and Ambu  
6 allegedly lost) as a result of the alleged advertising. As explained earlier, Dr. Sullivan calculates  
7 the amount of sales that LMA gained and (Ambu lost) by "determining Ambu's relative sales  
8 share that would have been realized in the absence of the alleged conduct." Stowell Decl., Ex. 1 at  
9 26. Although Dr. Sullivan does not disclose his underlying economic model, his exhibits indicate  
10 that he calculates a future growth rate for Ambu's sales share by applying a regression analysis to  
11 Ambu's 14 months of sales between April 2004 (which Ambu claims is the inception of the  
12 product) and June 2005 (which Ambu claims is the purported inception of the alleged false  
13 advertising). See *id.* at Exs. 38, 41; see *also* Stowell Decl., Ex. 2 at 3. Based on that regression  
14 analysis, Dr. Sullivan calculates a monthly growth rate going forward of 1% per month. Stowell  
15 Decl., Ex. 1 at 26 and Exs. 38, 41. Dr. Sullivan then assumes that Ambu would have continued to  
16 gain sales share at this rate for a total of 36 months but for the improper acts of LMA. See *id.*  
17 Thus, Dr. Sullivan asserts that by the end of the 36 months – namely by the end of March 2007 –  
18 Ambu would have obtained a sales share of 35.8% and continued to maintain that sales share  
19 through the end of Ambu's alleged damages period in April 2009. See *id.* Based on his  
20 hypothetical sales share, Dr. Sullivan predicts that between August 2005 and April 2009, instead  
21 of selling 2,597,486 and 8,196 units of AuraOnce and Aura40 and earning \$7,942,867 and  
22 \$852,828 in profits, respectively, Ambu would have sold 4,736,136 and 25,526 units and earned  
23 \$13,411,239 and \$2,654,522 in profits, respectively. See Stowell Decl., Ex. 3 at Schedules 3, 4.

24         Although Dr. Sullivan purports to apply economic analysis to existing data, in fact his  
25 opinion regarding the sales share Ambu would have obtained but for the alleged false advertising  
26  
27 is expected to lose sales as a result of LMA's advertising. The decline does not provide any evidence that  
28 Ambu in fact lost sales as a result of the alleged advertising.

See Stowell Decl., Ex. 2 at 9.

1 is based on insufficient data, faulty economic reasoning, and pure speculation. As nothing more  
2 than a house of cards, it cannot stand.

3 a. Dr. Sullivan's Prediction of a 1% Monthly Growth Rate in Sales  
4 Share Is Based on Insufficient and Arbitrary Data and Flawed  
5 Economic Analysis

6 Dr. Sullivan's opinion that Ambu would have experienced a 1% monthly market growth  
7 rate for three years is unreliable first and foremost because it is based on insufficient data, namely,  
8 14 months of sales from the startup of Ambu's business. While Ambu's 14 months of sales may  
9 be sufficient to determine that Ambu would have made a profit in the future (if, e.g., Ambu were  
10 seeking future lost profits), it is simply too short and unreliable a period to predict the rate of  
11 growth, if any, that Ambu would have experienced in the future.

12 Apart from the fact that it is based on too short a operating period upon which to predict  
13 future growth rate, Dr. Sullivan's forecast of future sales share growth of 1% per month is  
14 unreliable and statistically flawed for numerous reasons. To begin with, Dr. Sullivan's reliance on  
15 monthly sales data to extrapolate future market share growth is unreliable in light of the fact that  
16 Ambu's monthly sales totals varied wildly. See Stowell Decl., Ex. 2 at 7 ("Ambu's claim is based  
17 on monthly sales data that fluctuates substantially due to occasional large orders."). Given that  
18 fact, Ambu's monthly sales totals provide an inherently unreliable basis on which to predict future  
19 market growth rate. See *id.*

20 Dr. Sullivan's reliance on Ambu's monthly sales totals to project future growth rate is  
21 further flawed insofar as he relies on monthly sales totals from a new business. Dr. Sullivan's  
22 analysis fails to take into account the fact that rapid growth frequently occurs when a product is  
23 first offered for sale. See *id.* at 6. However, growth rates observed during product launch seldom  
24 occur for years thereafter. See *id.* Thus, the fact that Ambu experienced a certain amount of  
25 growth in the first 14 months of business does not mean that Ambu would continue to experience  
26 that same rate of growth after that period. Indeed, as LMA's expert points out, most of Ambu's  
27 calculated growth occurred in the first three months following the product launch. *Id.* If the first  
28 three months of Ambu's sales are omitted from Dr. Sullivan's calculations, Ambu's growth in  
sales share is "only .35% per month, not 1.0%." *Id.* at 6, Exs. D, E. Applying that sales share

1 growth rate results in "but-for-market shares that are less than Ambu's actual market shares,"  
2 completely negating Ambu's claims for lost profits or unjust enrichment. See *Id.* at 6, Exs. E-1, D-  
3 E-1.

4 Accordingly, Dr. Sullivan's attempt to extrapolate a growth rate based on Ambu's first 14  
5 months of business is thus inherently unreliable. See *Oiness v. Walgreen Co.*, 88 F.3d 1025, 1031-  
6 32 (Fed. Cir. 1996) (expert testimony was not sufficient to support award of lost profits to patent  
7 owner where expert improperly based growth rate for sales throughout life of patent on figures  
8 from period in which product was first introduced to market; expert's reliance on initial sales data  
9 to extrapolate future growth was improper in light of fact that "[t]he 1984-1985 start-up figures  
10 distort[ed] [the expert's] growth rate projections" and fact that expert failed to account for initial  
11 large sales of headrests to retail outlets rather than consumers).<sup>3</sup>

12 Dr. Sullivan's economic model is not only based on unreliable and arbitrary data, but is  
13 statistically flawed in numerous respects. For example, he erroneously forces the intercept of his  
14 regression calculations to be zero, thereby drastically increasing the projected growth rate. See  
15 Stowell Decl., Ex. 2 at 8; Ex. 4 at 197-98. Dr. Sullivan further fails to account for the correlation  
16 of the sales data. Stowell Decl., Ex. 2 at 8. As Mr. Hoffman explains in his rebuttal report, "[t]he  
17 actual sales are about the same in the third month of the quarter as the sum of the first two months  
18 of the quarter" and "so you can see that somebody is channel stuffing." Stowell Decl., Ex. 4 at  
19 222-23. Thus, "the data are not independent because the third month of every quarter depends on  
20 the first two." *Id.* Dr. Sullivan further erroneously ignores the presence of other competitors in the  
21 marketplace, causing him to overstate the size of Ambu's sales share both before and after the  
22 alleged false advertising. See Stowell Decl., Ex. 2 at 5-6; Stowell Decl., Ex. 4 at 187-89. Dr.  
23 Sullivan's failure to consider other competitors is flatly inconsistent with his rebuttal report, which  
24 specifically assumes the presence of other competitors in the marketplace and their ability to  
25 capture sales. See Stowell Decl., Ex. 5 at 13, 16 (noting "the increasing number of competitors" in  
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27 Dr. Sullivan's calculation of a monthly 1% growth rate also arbitrarily excludes Ambu's sales that  
28 occurred in February and March 2004. Stowell Decl., Ex. 2. Adding those months to Ambu's growth  
analysis reduced Ambu's sales share growth rate to approximately .83%, thereby reducing Ambu's claim of  
unjust enrichment by \$3 million and lost profits by \$2.3 million *Id.* at 7, Ex. 2.

1 the laryngeal mask market and criticizing the assumption of LMA's expert that LMA would have  
2 obtained 80% of Ambu's infringing sales).

3 Dr. Sullivan's projected growth rate is also unreliable to the extent he bases it on sales of  
4 the AuraOnce product, but applies it to the Aura40 product. Dr. Sullivan offers no explanation or  
5 justification for applying a growth rate based on data from sales of a product between April 2004  
6 and June 2005 to a different product that was not introduced until March 2006. See Stowell Decl.,  
7 Ex. 2 at 9. Not only is there no basis to assume that the Aura40 product would have increased at  
8 the same rate as the AuraOnce product, but it is likely that sales of the former product negatively  
9 impacted sales of the latter.

10 In sum, the flaws in Dr. Sullivan's economic analysis are so fundamental as to render his  
11 entire paid-for prediction of a 1% future monthly growth rate entirely worthless. As LMA's expert  
12 explains, Dr. Sullivan's "economic" model is nothing more than "junk science." Stowell Decl.,  
13 Ex. 4 at 189, 202, 332.

14 **b. Dr. Sullivan's Assumption that Ambu Would Have Continued to**  
15 **Increase Its Sales Share for Three Years is Completely**  
16 **Speculative**

17 Dr. Sullivan's damages analysis is not only unreliable insofar as it predicts Ambu would  
18 experience a future monthly growth rate of 1%, but also insofar as it assumes that growth rate  
19 would continue unabated in 2008 (thus, exponentially increasing the sales share Ambu's products  
20 actually obtained from 2006 to 2008). See Stowell Decl., Ex. 3, at Schedules 1, 5. Dr. Sullivan  
21 states that "[a] relative sales share of 35.8% comports with Ambu's sales performance prior to the  
22 alleged conduct and recognizes LMA's established market position." Stowell Decl., Ex. 1 at 26.  
23 But he provides no basis for that conclusion. Dr. Sullivan's sole reason for choosing a three-year  
24 period is that "[c]ontracts with group purchasing organizations typically have a length of three  
25 years" and "[a]ccordingly, there would be an opportunity for Ambu to engage business with all  
26 GPOs at some point in the three years following product inception." *Id.* But that fact does not  
27 mean that Ambu would have obtained any such contracts as they became available. Dr. Sullivan's  
28 opinion that Ambu would continue to experience steady growth for 36 months is simply purely

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28

1 pulled out of the air. It does not comport with any real-world data relating to the experience of  
2 Ambu or any other comparable seller.

3 Not only is Dr. Sullivan's prediction that Ambu would continue to experience 1% monthly  
4 growth in sales share for at least three years completely without evidentiary foundation, but it is  
5 completely undermined by Ambu's own projections made prior to the alleged false advertising. As  
6 shown by a 2002 forecast, Ambu predicted that it would obtain 10% of the hospital market by  
7 2008 — significantly less than the 35.8% sales share that Ambu is now claiming it would have  
8 obtained but for the alleged advertising (indeed, less than the 18.6% share Ambu ultimately  
9 obtained in 2008). See Stowell Decl., Ex. 6; see also Stowell Decl., Ex. 3 at Schedule 5. Ambu's  
10 own, unbiased forecasts made prior to this litigation are clearly more reliable than those of its paid  
11 expert that it is seeking to offer in this litigation. See *In re Iridium Operating LLC*, 373 B.R. 283

12 (S.D.N.Y. 2007) (expert's "opinions are suspect because he ignored or wrongly discarded [the  
13 company's] projections and much of the contemporaneous market research underlying those  
14 projections and instead created his own projections for litigation purposes").

15 The unreasonableness of Dr. Sullivan's assumption of three years of unabated market  
16 growth is further demonstrated by comparing Ambu's performance to that of its competitors. No  
17 other competitor of LMA has achieved anything close to the market share Ambu claims it would  
18 have obtained. Stowell Decl., Ex. 2 at 9. Competitors, such as Vital Signs, a subsidiary of GE, and  
19 Nellcor, a subsidiary of Tyco Healthcare, are part of larger companies that have extensive  
20 marketing capacity and ample capital available to pursue a greater share of the laryngeal mask  
21 market. *Id.* at 9 and n.30; Stowell Decl., Ex. 7; Stowell Decl., Ex. 8 at 54; Stowell Decl., Ex. 9 at  
22 20. Although neither of those companies were the target of false advertising as alleged by Ambu,  
23 neither has achieved anything even close to a 10% share of the market. Stowell Decl., Ex. 8 at 54-  
24 57. There is no reason to assume that Ambu, unlike the other competitors in the market, would  
25 have obtained a 35.8% share of the market but for the alleged false advertising. Stowell Decl., Ex.  
26 2 at 9.

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product. See *Id.* at 3-5. Ambu's own surveys show that it did not lose sales because of LMA's

advertising but rather because of a variety of the factors described above, particularly, complaints about the clinical performance of Ambu's products. *See* Plaintiffs' Memorandum of Points and

Authorities in Support of Their Motion for Summary Judgment on Ambu’s Lanham Act and Related State Law Counterclaims for Failure to Establish Injury and Entitlement to Injunctive and Monetary Relief at 7. Indeed, the evidence shows that while customers may have been initially satisfied with Ambu’s products, after a period time, they frequently switched back to LMA due to problems with the clinical performance of Ambu’s products.<sup>4</sup>

Stowell Decl., Ex. 11 at LMA00100040 ("after 2 or 3 months [patients using Ambu] see a loss of seal on about 20% to 30% of their cases."); Stowell Decl., Ex. 11 at LMA00100040 ("after a short time they [Ambu customers] would find 'more and more cases of the product not fitting correctly and decide to stay with LMA'"); Stowell Decl., Ex. 12 (the "shine [wore] off the Ambu Laryngeal Mask. The initial wave of optimism and acceptance amongst many clinicians [was] replaced with some criticism," such as (1) OAH Kirkin Clinic which found Ambu masks "too stiff and too sharp of an angle" and (2) Hospital of St. Raphael, which reported a lost airway with an Ambu mask causing the nurse anesthetists to declare that "she'd never use the Ambu again"); Stowell Decl., Ex. 13 at LMA00054513 (after Atlanta Medical Center used Ambu masks for "2 or 3 months], [their initial positive impressions of the Ambu mask wore off over time as their clinical experience began to mount. Increasingly the Ambu had difficulty seating in the patient, and they began to experience problems obtaining a good seal around the glottic opening. It wasn't long before the clinical staff STOPPED using them, and went to purchasing saying they "hated the product" – return it!"). (emphasis in original); Stowell Decl., Ex. 14 (BromMeen Medical Center "experienced difficulty upon insertion [of Ambu's product] as well as difficulty maintaining an effective seal over the larynx," causing the anesthesia staff to demand reconsideration of the purchasing decision to buy Ambu masks); Stowell Decl., Ex. 15 (Ray Health switched from Ambu masks back to LMA because clinicians "did not like them" as they "lost seal").

1 148:20-23 (explaining that in 2004, the American Society of Anesthesiologists (“ASA”) selected  
2 Dr. Person’s study for presentation at the 2004 ASA conference); *id.* at 148:6-16, 149:18-50/30,  
3 102:5-103:2; Stowell Decl., Ex. 17 (Dr. Person’s abstract was published in *Anesthesiology*  
4 (2004)); Stowell Decl., Ex. 18 (Dr. Person presented a scientific poster at the 2004 ASA  
5 conference that reported the full results of his research); Stowell Decl., Ex. 19 (In 2008, Dr.  
6 Person’s research was published in a chapter in the textbook *Complications in Anesthesiology*  
7 (2008) entitled “Safety and Hazards Associated with Tracheal Intubation and Use of  
8 Supralaryngeal Airways,” which was cited by, among others, Dr. Nikolaus Gravenstein, one of  
9 the experts engaged by Ambu in this case). Similarly, Dr. Sullivan’s analysis fails to account for  
10 the effect of any true statements in the LMA Brochure regarding the safety and reliability of

11 [REDACTED] These failures further undermine Dr. Sullivan’s damages analysis. *See Bracco*,  
12 2009 WL 1743699, at \*74 (finding that plaintiff did not show “that it was [the defendant’s] false  
13 advertising and not the GPOs’ independent evaluation of the various scientific studies which  
14 caused the loss of the contracts”); *id.* at \*75 (“Bracco leaves the Court conjecturing the extent of  
15 the sales trend reflecting GEH’s false advertising as opposed to the publication of NEHPRIC in  
16 the widely respected NEJM, as well as GEH’s true messages taken from NEPHRIC and other  
17 articles. Without such showing, Bracco is not entitled to lost profits.”).

18 Finally, Dr. Sullivan’s damages calculations ignore the presence of other competing Ambu  
19 products [REDACTED]

20 [REDACTED]  
21 [REDACTED]  
22 [REDACTED]

23 Accordingly, there is simply no basis for Dr. Sullivan’s attribution of the entire purported  
24 decline in Ambu’s purported growth rate to the alleged false advertising. *See Bracco*, 2009 WL  
25 1743699, at \*34, 36 (excluding experts’ testimony that decline in sales resulted from false  
26 advertising where experts “did not take into account numerous, or indeed, [the] most relevant  
27 factors as to causation” and failed to take into account the market effect of the defendant’s proper  
28

1 promotional efforts, and where expert had no basis for attributing 100% of the alleged drop-off in  
2 the plaintiff's sales to the false advertising at issue).

3 **d. Sales Trend Evidence Undermines Dr. Sullivan's Conclusions**

4 Last but not least, Dr. Sullivan's opinion that Ambu's sales share growth would have been  
5 greater but for the alleged false advertising is fully contradicted by Ambu's actual sales trend  
6 evidence. As LMA's expert explains, "[I]f the allegedly false advertising caused the severe  
7 impact claimed by Ambu, this should be evident from Ambu's sales trend." Stowell Decl., Ex. 2 at  
8 1. In fact, Ambu's sales continued to increase in the months following the allegedly false  
9 advertisement. See *id.* at 4, Ex. B. AuraOnce Curve sales totaled nearly 200,000 units in the third  
10 quarter of 2006, the second highest quarterly amount ever in Ambu's history. *Id.* While AuraOnce  
11 Curve sales began to flatten beginning in the fourth quarter of 2006, that coincided with the launch  
12 of the AuraOnce Straight and the Aura40 products, which likely negatively impacted the sales of  
13 the AuraOnce Curve product. *Id.* LMA's actual sales trend evidence similarly undermines Dr.  
14 Sullivan's conclusions. Sales of the LMA Unique in fact increased at a lower rate after the alleged  
15 advertising. See *id.* at 4, Ex. B-1. In fact, LMA Unique sales actually decreased in the six months  
16 immediately following the release of the alleged false advertising. *Id.*

17 In sum, Mr. Sullivan's "expert" opinion that Ambu's sales share would have continued to  
18 increase for three years to reach 33.3% and then remain at the level until the present day is based  
19 on nothing more than "bold speculation." *Oiness*, 88 F.3d at 32. "[B]ecause [Dr. Sullivan's]

20 projections of lost profits in the [laryngeal mask market] rest on faulty assumptions and a lack of  
21 reliable economic testimony relevant to this market," his testimony is insufficient to support an  
22 award of lost profits as a matter of law. *Id.* (finding expert's growth rate projections were too  
23 speculative to support award of lost profits); *see also Oyster Software, Inc. v. Forms Processing,*  
24 *Inc.*, No. C-00-0724 JCS, 2001 WL 1736382, at \*6 (N.D. Cal. Dec. 6, 2001) (expert report was  
25 "insufficient to create a material issue of fact concerning [plaintiff's] lost profits because it is  
26 entirely speculative on the issue of causation of actual damages"); *Lith. Commerce Corp. v. Sara*  
27 *Lee Hosiery*, 179 F.R.D. 450, 461 (D.N.J. 1998) (excluding economic expert testimony that was  
28 based on unsupported and speculative assertions, including assumptions that the plaintiff's "share

1 of the Lithuanian market would have increased at a rate of 1% annually and that [the plaintiff's]  
2 participation in various markets would last for certain durations").

3 **3. Dr. Sullivan's Opinion Regarding Corrective Advertising Costs Is**  
4 **Unreliable**

5 Like his opinions regarding the amount of profits that LMA purportedly gained (and Ambu  
6 purportedly lost) as the result of LMA's alleged false advertising, Dr. Sullivan's opinion regarding  
7 the amount that it would take to correct the effect of the advertising is totally divorced from  
8 reality. [REDACTED]

9 [REDACTED] According to Dr. Sullivan, "[t]he expenses incurred by LMA to advertise, market, and  
10 promote the Ferson Study and the LMA Brochure, and the statements contained therein, provide a  
11 reasonable proxy for the expenditure that would be required by Ambu to correct the false and  
12 misleading statements." Stowell Decl., Ex. 1 at 28. Specifically, Dr. Sullivan states that LMA  
13 spent \$361,471 on advertising expenses from June 2005 through December 2008 and asserts that  
14 that amount "is a lower bound on the expenditure that would be required by Ambu to correct the  
15 false and misleading statements." *Id.* at 29. Dr. Sullivan further states that LMA has "average  
16 annual marketing expenses of approximately \$1.9 million" and asserts that that amount is "a  
17 reasonable estimate for the expenditure that would be required by Ambu to correct the false and  
18 misleading statements." *Id.*

19 Dr. Sullivan's conclusions are completely unreliable. Ambu's false advertising claims arise  
20 from LMA's use of a brochure and other statements concerning the Ferson Study. Dr. Sullivan is  
21 not an advertising or marketing expert and it not qualified to opine on the amount required to  
22 correct any effects of the alleged advertising. [REDACTED]

23 [REDACTED] That is more, Dr. Sullivan provides no factual basis  
24 for his assumption that the cost to counter the effects of the alleged false advertising would be the  
25 total amount paid by LMA for all of its advertising and marketing over an extended period of  
26 time. In fact, Ambu's "lower bound" exceeds Ambu Inc.'s total marketing budget for all of 2009.  
27 Stowell Decl., Ex. 20 at 236. Dr. Sullivan's testimony regarding the amount of advertising  
28 expenses it would take to correct any effects of the alleged false advertising is accordingly  
unavailing under the principles of Rule 302 and *Daubert*.

1     **V.     CONCLUSION**

2             For the reasons set forth above, LMA respectfully requests that the Court grant its motion  
3     to exclude the testimony of Ryan Sullivan, Ph.D.

4  
5                             Respectfully submitted,

6                             KNOBBE, MARTENS, OLSON & BEAR, LLP

7  
8     Dated: August 14, 2009

By: /s/ Frederick S. Berretta

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12                             Attorneys for Plaintiffs and Counter-Defendants  
13                             THE LARYNGEAL MASK COMPANY LTD.  
14                             and LMA NORTH AMERICA, INC.

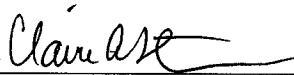
1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on August 14, 2009, I caused the foregoing **PLAINTIFFS'**  
3 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THEIR**  
4 **DAUBERT MOTION TO EXCLUDE THE EXPERT TESTIMONY OF RYAN SULLIVAN**  
5 to be electronically filed with the Clerk of the Court using the CM/ECF system which will send  
6 electronic notification of such filing to the applicable registered filings users, including the counsel  
7 identified below:

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14 I declare that I am employed in the office of a member of the bar of this Court at whose  
15 direction the service was made.

16 Dated: August 14, 2009

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18 Claire A. Stoneman  
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